No. 13092

United States
COURT OF APPEALS
for the Ninth Circuit

OREGON AUTOMOBILE INSURANCE COMPANY,
Appellant,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY, a Corporation, BEULAH MORRIS and WILLIAM MORRIS,
Appellees.

BRIEF FOR APPELLEES BEULAH MORRIS AND WILLIAM MORRIS

Appeal from the United States District Court for the District of Oregon.

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STEVENS-NESS LAW PUB. CO., PORTLAND

SUBJECT INDEX

INDEX OF AUTHORITIES

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STATEMENT OF THE CASE

The statement of facts of the case and controversy as set forth in the appellant's Brief on pages 2 to 7 is essentially correct. The controversy herein stems from an accident which took place on the 15th day of October, 1949, when Raymond Suter was driving an automo-

bile for the purpose of demonstration, the automobile being a Mercury, and it was at that time owned by the Redmond Motor Company and/or Houk Motor Company. This car collided with an automobile owned and operated by Mr. William Morris, one of the appellees herein. The Mercury automobile which Suter was driving was covered by a Liability Insurance Policy issued on the first day of October, 1949, by the Oregon Automobile Insurance Company, the appellant herein (and hereinafter referred to as Oregon); said policy having been issued to the Houk Motor Company, the Redmond Motor Company and the Redmond Tractor Company. This policy is set forth on page 93 through 106 in the transcript of record herein (R. 93 through 106).

Suter at this time owned a Plymouth automobile, and for the purpose of insuring the operation of said automobile, had purchased from the United States Fidelity and Guaranty Company (an appellee herein referred to hereinafter as U. S. F. & G.) a policy of liability insurance with himself as the named insured. The Plymouth automobile was not involved in the accident herein. This policy is found in the transcript of record on pages 15 to 20 (R. 15 through 20). Appellee Beulah Morris brought an action at law for personal injuries in the County of Deschutes, Oregon, Clerk's file No. 7780, in which she named Raymond Suter, Houk Motor Company, a corporation, and James Stuchlik as defendants. Thereafter the 20th day of November, 1950, said case was tried in Deschutes County resulting in a verdict and judgment against defendant Raymond Suter in the sum of $7,360.00.

Prior to the trial of this case, there was correspondence between Oregon and U. S. F. & G. as to which company was liable for the defense of Suter in the Deschutes County action. On November 9, 1950, the attorneys for Oregon, in a letter to the attorneys for U. S. F. & G., denied any and all liability under its policy with respect to Suter (R. 127-8).

On the 17th of November, attorneys for Oregon, in a letter to Suter specifically denied that their policy covered Suter, and refused to accept any responsibility in defending Suter or in satisfying any judgment which might be recovered against Suter (R. 131-32).

Subsequently, appellee U. S. F. & G. instituted the present action, a declaratory judgment suit in the District Court of the United States of the District of Oregon. In this case a judgment was rendered by the trial court from which judgment, Oregon, as appellant, has now brought the case to this court.

It will be noted that, although the appellant specified twenty three alleged errors of the trial court, pages 7 to 14 of the Appellant's Brief, appellant does admit that the crucial question involved herein is whether the policy of insurance issued by itself is primary or excess as to the policy of insurance issued by U. S. F. & G., page 70, Appellant's Brief.

ARGUMENT

1.

The Trial Court was entirely correct in finding that the policy of insurance issued by Oregon was primary

coverage, hence Oregon is obligated to satisfy the judgment as entered by the trial court.

After a careful inspection of the briefs for both appellant and appellee, U. S. F. & G., these appellees feel that it would be a burden on the court to set out fully the legal position taken by Appellees Morris. The appellees have no quarrel with the findings of the trial court to the effect that the Oregon coverage is primary and the U. S. F. & G. coverage is excess.

These appellees have carefully considered the brief of appellee U. S. F. & G. and wish at this time to adopt it in its entirety, both for the purpose of answering the arguments of the appellant and for the purpose of setting forth affirmative reasons why the Oregon coverage is in fact primary. Appellees Morris are in complete agreement with the propositions of law advanced by appellee U. S. F. & G.

2.

These appellees contend that specifications of errors Nos. 5 and 11 (R. 79, 189, 83, 191) (and appellant's brief pages 9 and 11) are not well taken.

Michigan Millers Mutual Fire Insurance Company v. Grange Oil Company of Linn and Benton Counties, 175 F. (2d) 544 (9 C.C.A. 1949).

Horwitz v. New York Life Insurance Company, 80 F. (2d) 295 (9 C.C.A., 1935).

Oregon Compiled Laws Annotated, Section 101-134.

It will be noted that nowhere in the argument of appellant is there specific support for specification of

errors Nos. 5 and 11 which specifications allege that it was error for the trial court to find in favor of appellee Beulah Morris in the sum of $250.00 attorneys fees for prosecuting the declaratory judgment suit. These appellees assume it is appellant's contention that in the event the U. S. F. & G. coverage is found to be primary, Oregon will be absolved of any liability to Morris on account of attorneys fees.

An allowance of attorneys fees in the Trial Court was made on the basis of petition for attorneys fees entered by attorney for appellees Morris (R. 64), said petition having been submitted under the provisions of Oregon Compiled Laws Annotated, section 101-134. A finding of fact was entered by the Trial Judge on the 19th of July, 1951, (R. 79) whereby the appellee Beulah Morris was found to be entitled to recover from the defendant Oregon the sum of $250.00 attorneys fees for representation in the declaratory judgment suit by means of which she sought to enforce payment of her judgment which both insurers had refused to pay. Based upon said finding of fact, there was included in the judgment decree entered herein on the 19th of July, 1951, (R. 83) an allowance of attorneys fees of $250.00 for Beulah Morris.

It was held in the case of *Horwitz v. New York Life Insurance Company,* 80 F. (2d) 295 (9 C.C.A., 1935) that it was proper for the trial court to allow attorneys fees in an action arising out of an insurance policy, said attorneys fees to be assessed against the unsuccessful insurance company litigant.

Judge Denman said in the Horwitz case, page 302:

> "Under the Oregon law the insured is entitled to his attorneys' fees to be fixed in amount by the court. Oregon Code § 46-134, as amended by Laws 1931, p. 620.* The rules of the District Court adopt the law of Oregon with reference to court costs. Such a provision of the Oregon law, by way of costs, is an incident of the remedy and is controlled by the law of the forum. Supreme Lodge, Knights of Pythias, v. Meyer, 198, U.S. 508, 517, 25 S. Ct. 754, 49 L.Ed. 1146; Fidelity Mutual Life Ass'n v. Mettler, 185 U.S. 308, 322, 22 S. Ct. 662, 46 L. Ed. 922. The insured is entitled to a decree for an amount of attorneys' fees to be fixed by this court which has finally tried the issued."

It will be noted that attorney for appellant stated (R. 166) to the trial court that the appellant did not seriously oppose the allowance of some attorneys fees to the attorneys for Beulah Morris. At the time of making the argument attorney for appellant was primarily concerned with reasonableness of the amount of the attorneys fees rather than the awarding of some attorneys fees.

Appellant's specifications of error Nos. 5 and 11 do not attack the reasonableness of the allowance, but the validity of the allowance.

We submit that the trial court was empowered to find for appellee Morris on the question, and that exceptions to such finding are not well taken.

In *Michigan Millers Mutual Fire Insurance Company v. Grange Oil Company of Linn and Benton Coun-*

*Now codified as O.C.L.A. § 101-134.

ties, 175 Federal (2d) 544 (9th Circuit, 1949) this court had before it the question of allowance of attorneys fees on appeal. In that case the Court held that in the light of the *Horwitz* case above cited, and under O.C.L.A. 101-134, not only was the party maintaining an action arising from the policy entitled to reasonable attorneys fees in the tiral court, but that if said allowance was made by the trial court, the appellate court would also award reasonable attorneys fees upon affirmation of the judgment.

CONCLUSION

We agree with appellant that in this field of law a practical approach to the problem is essential. These appellees have at all times and in good faith been actual litigants in this declaratory judgment suit and interested parties and have properly moved the trial court for reasonable attorneys fees under the applicable statute and submit to this appellate court that on the basis of the judgment entered herein these appellees are entitled to the attorneys fees as allowed by the trial court.

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